APPENDIX 1

Opinion of Court of Appeals

[Amended by Order printed herein as Appendix 2, *infra*]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 245—September Term, 1966.

(Argued December 7, 1966 Decided December 29, 1966.)

Docket No. 30695

UNITED STATES OF AMERICA,

Appellee,

—against—

HENRY B. MCFARLAND,

Appellant.

Before:

LUMBARD, *Chief Judge,*

HAYS and FEINBERG, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, and a jury, convicting appellant of perjury before the grand jury, 18 U. S. C. §1621. Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for Appellant.*

CHARLES J. FANNING, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Jack Kaplan, Douglas S. Liebhafsky, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Appellant Henry B. McFarland was convicted of two counts of perjury before a grand jury in violation of 18 U. S. C. §1621, after trial by jury in the Southern District of New York. Finding no error in his trial, we affirm the judgment.

Since appellant does not argue insufficiency of evidence, only a brief statement of facts is required. Since 1951, appellant had been the warden of the Hudson County Jail in Jersey City, New Jersey. In January 1965, a grand jury in the Southern District of New York was investigating the transportation of prostitutes from that district to the Hudson County Jail and the use of telephones in connection therewith. Appellant appeared before the grand jury on January 26, 1965, and the following December was indicted for perjury.

The indictment charged, *inter alia*, that the grand jury was investigating possible violations of the Mann Act, 18 U. S. C. §§2421-22, and the Federal Communications Act, 47 U. S. C. §§203, 501, to determine if those statutes had been violated by transporting women from the Southern District for the purpose of prostitution to the Hudson County Jail, and by the use of interstate telephone facilities in connection with such transportation; that the jury

was also investigating possible obstruction of the aforesaid investigation; that it was material to the investigations to ascertain appellant's relationship with one Marilyn Jean Fraser and whether appellant had accepted money from inmates of the jail for granting them special treatment such as use of telephone facilities, special meals and sleeping quarters, and visiting privileges including visits from prostitutes; and that appellant knowingly and under oath stated material matter which he did not believe to be true. There were four counts to the indictment, consisting of specifications of perjury relating to whether appellant (1) knew Miss Fraser; (2) permitted inmates, in return for money, to make telephone calls other than notification to their families that they were in custody; (3) permitted inmates, in return for money, to have special favors, such as special meals, special quarters, and visits from women; and (4) permitted prostitutes to visit one Harold Konigsberg and other inmates. Before the grand jury, appellant flatly denied knowing Miss Fraser or giving such permission. At trial, before the case was submitted to the jury, the first and fourth counts were dismissed for insufficiency of proof. On the second and third counts, there was ample evidence (if believed by the trial jury) that appellant, in return for money, had permitted inmates to make telephone calls and have special favors.[1]

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[1] *E.g.*, one inmate testified that he had paid the warden sums of money and received various favors including use of the telephone, the latter to such an extent that the warden complained "that I made too many telephone calls and I talked too long on the phone, that the bill was kind of high."

Appellant asserts that the dismissed counts were the only ones directly dealing with prostitution[2] and that their elimination, combined with the alleged irrelevance of the Federal Communications Act to any of the activities under investigation by the grand jury, made the remaining two counts inherently unsuitable for a federal perjury prosecution. Our vagueness in recounting appellant's principal point reflects the cloudiness of the argument. As best we can tell, appellant's claim is that since the Mann Act vanished from the case at the trial stage, the remaining questions and answers could not have been material or constitutionally proper at the grand jury stage because they were only an excursion into non-federal matters.

We think appellant is grossly mistaken as to the purpose and the proper application of the perjury statute that the trial jury found he had violated, 18 U. S. C. §1621. Essentially, the statute punishes lying under oath before a federal official or tribunal. No claim is made that the Government does not have a constitutionally enforceable interest in prohibiting such perjury. To be within the reach of section 1621, the lies must be material, which in this case means that "the false testimony . . . [must have] a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation." *United States* v. *Marchisio*, 344 F. 2d 653, 665 (2d Cir. 1965), quoting *Carroll* v. *United States*, 16 F. 2d 951, 953 (2d Cir.), cert. denied, 273 U. S. 763 (1927).[3] Appellant's crime is thus committed

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[2] The theory of the prosecution was that Miss Fraser (mentioned in the first count) visited the jail for purposes of prostitution.

[3] Materiality is a question for the court, and the trial judge properly reserved that issue to himself. *United States* v. *Marchisio*, 344 F. 2d 653, 665 (2d Cir. 1965).

in front of the grand jury, and materiality must be established only as of the time his answers were given. Materiality cannot "vanish" from the case "by the time it is submitted for the Trial Jury's consideration," as appellant contends; "materiality" refers merely to the relationship between the interrogation and the grand jury's objective at the time. Cf. *United States* v. *Siegel*, 263 F. 2d 530, 533 (2d Cir.), cert. denied, 359 U. S. 1012 (1959). Moreover, despite appellant's casual use of the term, there is no such concept as a "Man Act perjury" case under section 1621; a charge of lying under oath brought under that provision does not carry a burden of characterization of the lies according to another criminal statute. Once it be conceded that the grand jury was investigating matters within its jurisdiction, materiality to that investigation is the only link the Government must establish between the testimony and the federal criminal law.

Applying these principles to this case, it is apparent that whether appellant was accepting money for allowing inmates unusual telephone privileges (the second count) and special favors (the third count) would have a bearing on an investigation into whether prostitutes were being illegally transported to the jail. Appellant does not seem to deny that the grand jury was investigating possible Mann Act violations. In any event, there is no doubt but that the second and third counts concerned material testimony. It is therefore unnecessary to deal with appellant's additional involved contention that the questions and answers contained in the second and third counts were also not material to possible violations of the Federal Communications Act, an argument that apparently calls for us to overrule

United States v. *Harris*, 334 F. 2d 460, 463 (2d Cir. 1964), rev'd on other grounds, 382 U. S. 162 (1965).

Appellant also apparently claims that the entire testimony of Government witness Pollack should have been stricken after he invoked his privilege against self-incrimination and refused to answer two questions on cross-examination. These were whether Pollack had ever used another name, and whether he had numerous safe deposit boxes around the country in January 1966. These matters did not bear on appellant's guilt or innocence; they went to the witness's credibility only. Since appellant consumed a good part of two trial days in cross-examining Pollack, any contention that the cross-examination was improperly curtailed is almost ludicrous. In any event, the claims of privilege did not require striking of the witness's direct examination. *United States* v. *Cardillo*, 316 F. 2d 606, 611 (2 Cir.), cert. denied, 375 U. S. 822, 857 (1963).

Finally, appellant argues he was denied a fair trial by the prosecution's failure to timely and voluntarily disclose the psychiatric history of a Government witness. The issue arose in the following way: On cross-examination, the witness replied to defense counsel's inquiry as to her employment that she had been a patient in the Manhattan State Hospital for the mentally ill for eight months and had left eight months before trial. The prosecution objected to this line of inquiry and, when defense counsel asked for the right to examine the hospital records, objected to that too. At the trial judge's direction, the records were obtained and submitted to him over the week-end; in his words, they disclosed

> [T]hat this young lady witness has had a series of problems for some time. They were somewhat of a

physical nature at times and somewhat of a mental nature at times, but here she has been produced on this stand and she has given direct testimony.

I have examined the Manhattan State Hospital clinical summary and the recommendation made by Dr. Mavaroic was a diagnosis of "Schizophrenia (other types) and schizo-affective."

Her condition was reported much improved on September 17, 1965 . . . .

* * * * *

And on September 17, 1965, the patient was discharged in her own custody.

The records were then turned over to defense counsel to examine.

We have carefully considered the question and do not find any harm to appellant from this incident: Defense counsel eventually learned all the facts of the witness's history in time to make full use of it on cross-examination, did get before the jury the essential information affecting her credibility, did not ask for any further adjournment, and did not move to strike the witness's direct testimony on the ground of incompetence. Cf. *Kyle* v. *United States*, 297 F. 2d 507, 513-14 (2d Cir. 1961). The fact that the witness had been a patient in a mental hospital did not render her incompetent as a matter of law, see 2 Wigmore, Evidence §497 (3d ed. 1940), and the trial judge handled the matter properly. However, this does not mean that the prosecutor's conduct was justified. We do not understand his position that it was irrelevant for defense on cross-examination

to bring out that a key prosecution witness had recently been in a mental hospital for several months. Moreover, the Government's silence as to the prior psychiatric history of the witness was improper, as was its own apparent failure to check further on the competence of the witness before calling her.[4] It must be emphasized that the Government cannot play it "close to the vest" in administering federal criminal justice, when duty and conscience dictate that certain facts should be disclosed to insure a fair trial. Matters bearing on the competence of a witness to testify are of the gravest import, and the prosecutor may not disregard them or leave it to chance that his adversary will learn of them. Cf. *Powell* v. *Wiman*, 287 F. 2d 275, 278-79 (5th Cir. 1961); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136 (1964).

The judgment is affirmed.

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[4] The prosecution had not seen the voluminous hospital records, but was aware that the witness had been treated psychiatrically at Mt. Sinai Hospital.

APPENDIX 2

Order of Court of Appeals (on Rehearing) Amending Opinion

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

HENRY B. MCFARLAND,

Defendant-Appellant.

PETITION FOR REHEARING AND (ALTERNATIVELY) MOTION FOR STAY OF MANDATE AND CONTINUATION OF BAIL PENDING CERTIORARI

Maurice Edelbaum, New York, New York, for defendant-appellant

Petition for rehearing by panel denied.

Motion for stay of mandate and continuation of bail pending application for certiorari granted subject to provisions of Rule 28(c).

"The opinion is amended in the following respects, all on page 707, slip opinion:

1. At line 15, a new footnote 4 is appended to the word 'silence,' the text of the footnote to read as follows:

4. We do not imply by this that the Government acted unethically. The Government correctly claims that

it did disclose to the court that the witness had been treated psychiatrically at Mt. Sinai Hospital. The disclosure was contained in one of the exhibits submitted to the court under the Jencks Act after direct examination of the witness had been concluded. However, there was at least a question as to whether this information should have been made known to defense counsel sooner; the matter, therefore, should have been specifically taken up with the court before the witness took the stand. Defense counsel could then have been apprised of the witness's history under appropriate judicial supervision.

2. At line 16, the word 'improper' is changed to 'ill-advised.'

3. At line 18, old footnote 4 is renumbered as footnote 5."

J. EDWARD LUMBARD

PAUL R. HAYS

WILFRED FEINBERG

U.S.C. JJ.

January 26, 1967

APPENDIX 3

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY B. MCFARLAND,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX 4

Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

"The Grand Jury charges:

1. On or about the 26th day of January, 1965, in the Southern District of New York, HENRY B. MCFARLAND, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, in a case in which a law of the United States authorizes on oath to be administered, to wit, a Federal Grand Jury of the United States of America, duly empanelled and sworn in the United States District Court for the Southern District of New York, and which was then and there inquiring for that District into offenses committed against the United States, did unlawfully, wilfully and knowingly and contrary to said oath, state material matter which he did not believe to be true, as is more fully set out hereinafter.

2. At the time and place aforesaid, the Grand Jury, inquiring as aforesaid, was conducting an investigation pertaining to possible violations of the White Slave Traffic Act and the Federal Communications Act, *more particularly, Title 18, United States Code, Sections 2421 and 2422, and Title 47, United States Code, Sections 203 and 501,* and other federal criminal statutes, for the purpose of determining whether any person violated such statutes by transportation of females in interstate commerce from the Southern District of New York for the purposes of prostitution at the Hudson County Jail, New Jersey, and by the use of inter-

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

state telephone communication facilities in connection with such transportation, or engaged in a conspiracy to commit such violations; and further, was conducting an investigation to determine whether any person had violated or conspired to violate the Obstruction, of Justice statute, *Title 18, United States Code, Section 1503,* by obstructing and impeding the aforesaid investigation into possible violations of the White Slave Traffic Act and Federal Communications Act and other federal criminal statutes.

3. It was material to the investigations described in paragraph 2 hereof that the Grand Jury ascertain *whether the defendant, Henry B. McFarland, the Warden of Hudson County Jail, knew or had ever met Marilyn Jean Fraser, and the extent, if any, of his relationship with her. It was further material to ascertain* whether the defendant had ever accepted any money or other things of value, directly or indirectly from inmates of the Hudson County Jail in consideration of the granting to such inmates special treatment such as the use of the jail telephone facilities, special meals and sleeping quarters, and visiting privileges, *including but not limited to visits from prostitutes for immoral purposes.*

4. *At the time and place aforesaid, Henry B. McFarland, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:*

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

'Q. I show you what is marked as Grand Jury Exhibit 3, and ask you if you ever saw that person before?

A. Not to my knowledge.

Q. You never saw her at the prison, at Hudson County Jail?

A. Never seen her any place to my knowledge.

Q. Did you ever see her in the company of Israel Schawartzberg?

A. I did not. I just made the statement that I didn't see her at any time, to my knowledge.

Q. Well, I want to be clear. You don't recall seeing her, is that it?

A. I never seen her, to my knowledge. That's very clear.

* * * * *

Q. And you never saw Miss Frazer, who was in the Grand Jury Exhibit 3, did you?

A. Don't recognize her.

Q. Well perhaps there is another picture that might—? I am showing you Grand Jury Exhibit 5, which is a different picture of Miss Fraser, with glasses on. Perhaps you can look at it. Tell us whether you ever saw that person.

A. I don't recognize her.

Q. You know Miss Fraser?

A. I do not.

Q. Marilyn Jean Fraser?

A. Never heard the name previous to this newspaper article.

Q. And is it that you don't recognize the person depicted in these two photographs or you never saw that person before?

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

A. Never recall seeing that person before.

Q. You don't recall now seeing that person before, is that it?

A. Well, I am asked now.

Q. You can't say now whether you have ever seen that person before?

A. Not to my knowledge. I just made that statement."

5. The aforesaid testimony of Henry B. McFarland, the defendant, as he then and there well knew, was untrue, in that in fact he knew and recognized Marilyn Jean Fraser, had met her in the company of Israel Schwartzberg and permitted her to visit inmates at the Hudson County Jail for immoral purposes.

(Title 18, United States Code, Section 1621)

SECOND COUNT

The Grand Jury further charges:

6. The Grand Jury repeats and realleges paragraphs 1, 2 and 3 hereof, as though fully set forth herein.

7. At the time and place aforesaid, HENRY B. MCFARLAND, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

'Q. Are there any regulations concerning telephone calls by inmates?

A. Occasionally we do allow an inmate to make a telephone call. A judge will order it, a district attorney, a United States district attorney,—may request that an inmate be allowed to call him.

Q. Are those the only instances—

A. They are the only ones.'

Q. May I finish the question please? Are those the only instances when inmates are permitted to make telephone calls?

A. They are the only instances. I'll make a call for them, to notify their families that they've been placed in custody; I'll—

Q. That would be the initial call, when they've first received there?

A. That's it, sir.

Q. Otherwise they are not permitted to make telephone calls?

A. They're not.

Q. You'd know about it, wouldn't you, if there were telephone calls being permitted to inmates, aside from those you've mentioned?

A. I should know about it, unless someone does it while I'm not there.

Q. Aside from these instances, you yourself have not ever permitted inmates to make telephone calls?

A. Definitely, no.

Q. Then it would follow that you've never received money from inmates to make telephone calls?

A. If they didn't make telephone calls, no sir. I didn't receive them.

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

Q. Did you ever receive money from inmates for telephone calls?

A. No.'

8. The aforesaid testimony of HENRY B. MCFARLAND, the defendant, as he then and there well knew, was untrue, in that he permitted certain inmates extensive use of the jail telephone facilities and accepted money from inmates for the privilege of making telephone calls.

(Title 18, United States Code, Section 1621)

THIRD COUNT

The Grand Jury further charges:

9. The Grand Jury repeats and realleges paragraphs 1, 2 and 3 hereof as though fully set forth herein.

10. At the time and place aforesaid, HENRY B. MCFARLAND, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:

'Q. And, just a broad question now: was there ever any liquor permitted inmates in prison?

A. I never drank in my life, sir, I have never smoked a cigarette in my life. The answer is, No.

Q. Not to the inmates?

A. To anyone.

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

Q. And they weren't permitted to have women in the jail?

A. Positively not; only their families. We have a rule that only the members of their family and no teenagers are allowed to visit the jail.

* * * * *

Q. Did you accept money from any prisoners for special quarters and special meals?

A. Positively not.

Q. At no time?

A. At no time.

Q. And you didn't accept any money from prisoners for special favors?

A. Positively not.

Q. That goes for telephone calls too?

A. Telephone calls and other services that were extended from the jail.

Q. Did you ever permit other prisoners, (other than Harold Konigsberg) for a consideration, to have private meals, telephone calls and visits by females.

A. Positively not.

Q. Absolutely not?

A. Positively.

Q. Is that right?

A. Positively not.'

* * * * *

11. The aforesaid testimony of HENRY B. MCFARLAND, the defendant, as he then and there well knew, was untrue, in that he had in fact accepted money directly and indirectly

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

from inmates for special privileges, special quarters and meals *and extraordinary visiting privileges including visits by females other than members of their families and had permitted inmates to have liquor in the jail.*

(Title 18, United States Code, Section 1621)

FOURTH COUNT

The Grand Jury further charges:

12. The Grand Jury repeats and realleges paragraphs 1, 2 and 3 hereof, as though fully set forth herein.

13. At the time and place aforesaid, Henry B. McFarland, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:

'Q. So to sum it up then you have no knowledge of any prostitutes visiting Mr. Konigsberg while in your jail?

A. Positively not.

Q. And you have no knowledge of any prostitutes visiting any inmates in your jail?

A. That's right. I have no knowledge. I don't know the morals of the ones that visit. I don't check on them.'

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

14. The aforesaid testimony of Henry B. McFarland, the defendant, as he then and there well knew, was untrue in that he knew of and permitted visits by prostitutes to Harold Konigsberg and other inmates of the Hudson County Jail.

(Title 18, United States Code, Section 1621)''

APPENDIX 5

Statutes Involved

18 U.S.C. § 1621

§ 1621. PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

47 U.S.C. § 201

§ 201. SERVICE AND CHARGES

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable

thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, § 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

Appendix 5

47 U.S.C. § 203

§ 203. SCHEDULES OF CHARGES; FILING WITH COMMISSION; CHANGES IN SCHEDULE; OVERCHARGES AND REBATES; PENALTY FOR VIOLATIONS

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may be regulations prescribe; but the Commission may, in its discretion

and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070.

Appendix 5

47 U.S.C. § 501

§ 501. GENERAL PENALTY

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, § 501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30.

APPENDIX 6

Excerpt from Petition For Rehearing In Court of Appeals (*Re* Government's Misconduct Relating to Witness Ruth Karsh)

III. THE PROSECUTOR'S CONDUCT AS TO THE PSYCHIATRIC HISTORY OF THE WITNESS RUTH KARSH.

Point III of our brief (pp. 66-69, with which see pp. 18-27) argued denial of fair trial by reason of the Government's conduct which prevented the Court and the defense from addressing themselves, *in advance of the direct testimony* of the witness Ruth Karsh, to the problem of that young lady's mental competence to testify. The prosecutor knew beforehand that Miss Karsh had suffered then recent psychiatric troubles of a most grave character, but he did not investigate the matter adequately himself before calling Miss Karsh to the stand, he took no step to inform the Trial Judge about it until after the conclusion of Miss Karsh's direct testimony and even then only by turning over to the Trial Judge an inconspicuous slip notation appended to one of the "3500" items, and he removed this single revelatory piece of paper from the "3500" documents before turning them over to defense counsel (which, again, was done only after conclusion of the direct examination, of course).

In this Court's opinion (slip op. 706-707), the prosecutor is criticized for this conduct, but it is held that the incident caused no harm to appellant. The Court states that we learned the facts in time to make full use of them on cross examination, that we got the essential information before the jury, that we did not ask for any further adjournment, and that we did not move to strike the witness's direct testimony on the ground of incompetence. The Court cites *Kyle* v. *United States*, 297 F. 2d 507, 513-514 (C.A. 2 1961),

which discusses in a general way the prosecutor's duty to make disclosures. The Court also notes that the fact that Miss Karsh had been a patient in a mental hospital did not render her incompetent as a matter of law, which we concede (and conceded in our brief, pp. 68-69).

However, except for its above noted statement that we did not move to strike the witness's direct testimony on the ground of incompetence, the Court's opinion does not seem to touch at all on what is by far the most important thrust of our contention in this branch of the case, namely, that the prosecutor's failure to make earlier disclosure absolutely deprived us and the Trial Judge of the opportunity to take up the question of Miss Karsh's competence before she took the stand and placed her extremely inflammatory testimony on the trial record. Counsel's technical failure to include in his voluminous motions at the end of the case a motion to strike Miss Karsh's testimony was undoubtedly a mistake, which counsel regrets. However, in the whole setting of the Karsh episode in this trial it really cannot be justly said that counsel in any meaningful way fell into any sort "waiver". A reading of our detailed recital of the relevant proceedings, at pp. 18-27 of our brief, shows how not only counsel but also the Trail Judge expressed repeated concern over the fact that the prosecutor's failure to make earlier disclosure had resulted in a *fait accompli* ineradicably lodging upon the record and in the jurors' minds the lurid and exceedingly harmful direct testimony of Miss Karsh. And in the concluding two sentences of the argument portion of our brief (p. 69) we called attention to the distinguished authority which favors the requirement of an anterior judicial finding as to mental competence before the witness is allowed to take the stand, all of which was hope-

lessly thwarted by the conduct of the prosecution in this case.

We respectfully and with all possible earnestness ask the Court to reconsider whether it may not well be that the Court gave insufficiently distinct attention to this point of ours that the Karsh episode hurt us not merely from the standpoint of opportunity for cross examination (which the Court apparently thought was a main part of our argument but which we in fact consider relatively unimportant), but above all from the standpoint of our anterior right or opportunity to have sought from the Trial Judge a ruling that Miss Karsh not be allowed to take the stand at all. And that such opportunity would most surely have been treated by the Trial Judge as a step of the gravest import for the fairness of this trial as a whole, can scarcely be doubted when, again, one reads our detailed factual recitals on this subject at pp. 18-27 of our brief, where it is shown that the Trial Judge repeatedly expressed intense distress and even indignation over the *fait accompli* consequences of the prosecutor's conduct in having brought it about that Miss Karsh's direct testimony was irrevocably planted in the jurors' minds.

In this entire picture, how much significance can justly be said to lie residually in our technical failure to have made a motion to strike Miss Karsh's direct testimony? It is a cliché that the striking of testimony in a jury trial is practically useless in situations of the vivid or melodramatic kind here involved. Neither reasoning drawn from formal doctrines of "waiver" nor, *a fortiori*, considerations of substantial justice, can justify any conclusion disadvantageous to the appellant in this situation, on account of the technical failure to make a motion to strike the direct testimony of Miss Karsh.

And since, as above emphasized, it is the direct testimony of Miss Karsh—and not her cross examination—which gives rise to our claim of error here, we respectfully ask the Court to give particular attention to our above suggestions as to the practical unimportance of our failure to make the motion to strike; for, again, it is solely this factor of the failure to make the motion to strike which the Court has adduced in its opinion as apparent justification for rejecting or disregarding our whole position concerning Miss Karsh's direct testimony in the light of the prosecutor's conduct.

There remains, finally, in connection with this issue of the prosecutor's conduct regarding Miss Karsh, the request of the Government for modification or withdrawal of the sentence in the Court's opinion where it is stated that the "Government's silence * * * was improper". The Government has made this request in the following letter to the Panel:

"UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER
RMM:ctd

January 4, 1967

Hon. J. Edward Lumbard
Hon. Paul R. Hays
Hon. Wilfred Feinberg
United States Court House
Foley Square
New York, N. Y. 10007

Appendix 6

Re: United States v. Henry B. McFarland
Docket No. 30695

Dear Judges:

This Court on December 29, 1966 affirmed the Judgment of conviction in the above-captioned case. On the last page of the opinion (page 707) this Court stated, *inter alia*, with respect to the witness Ruth Karsh: 'Moreover, the Government's silence as to prior psychiatric history of the witness was improper, * * *'

At the trial below, following Miss Karsh's direct testimony, the Government turned over to the Trial Judge as part of the witness' Section 3500 material, a report which disclosed that the witness had been a patient at Mount Sinai Hospital as a result of certain psychiatric problems. This was the only material which the Government had in its possession regarding the witness' psychiatric history and the trial court initially sustained the Government's position that this section of the report should not be produced for defense counsel. As the cross-examination proceeded, the trial judge turned this portion over to defense counsel.

The Government therefore initially and properly disclosed to the trial court the only material it had in its possession regarding Karsh's mental history. However, this Court's statement that the 'Government's silence * * * was improper' can be read to suggest that the Government acted in a deceitful manner regarding this witness. In view of the undisputed facts set out above, we respectfully request that this sentence in the opinion be modified or withdrawn.

A copy of this letter is being sent to Maurice Edelbaum, Esq. counsel for Appellant.

Very respectfully yours,

/s/ ROBERT M. MORGENTHAU
Robert M. Morgenthau
United States Attorney"

Appendix 6

After receiving a copy of the above letter, we wrote, at his Honor Judge Feinberg's request, a reply, which was as follows:

" Law Offices
MAURICE EDELBAUM

250 Broadway
New York 7, N.Y.

—

REctor 2-1300

FREDERICK S. ABRAMS
PHILIP R. EDELBAUM

January 5, 1967

Hon. Wilfred Feinberg, Circuit Judge
United States Court of Appeals,
Second Circuit,
United States Courthouse,
Room 2004,
Foley Square,
New York, N.Y.

Re: UNITED STATES v. HENRY B. MCFARLAND
Docket No. 30695

My Dear Judge Feinberg:

This is written, at the request of Your Honor's office, in response to United States Attorney Morgenthau's letter dated January 4, 1967, concerning the statements in the Court's opinion, in this case, addressed to the prosecution's contention as to not having earlier disclosed the psychiatric information about the witness Ruth Karsh.

The gist of Mr. Morgenthau's letter appears to be that in having turned over to the Trial Judge, after Miss Karsh's direct testimony, '3500' materials

which included an item revealing that Miss Karsh had been a psychiatric hospital patient, the Government satisfied its obligation of proper and ethical disclosure.

I am respectfully obliged to call Your Honor's attention to the fact that this suggestion of the Government that it met its ethical and constitutional obligations, is not at all a new matter in the appellate presentation which the parties have made to this Court. This same item was discussed in detail, with references to the record, at Pages 24-25 of the brief for appellant in this Court, where he pointed out that the Government's supposed disclosure to the Trial Court of the '3500' document in question had evidently not even been brought meaningfully home to the mind of the Trial Court itself; and that the Government, evidently without calling attention thereto, had unilaterally, seen fit to delete the item from the '3500' materials *sub silentio*, as it were, before furnishing the '3500' materials to defense counsel, on the ground that the item 'was not relevant to her direct testimony'.

While we therefore respectfully take the position that neither the Government's contention at the trial nor Mr. Morgenthau's letter of January 4, 1967 are meritorious of any ameliorative action by this Court in the Government's favor, we must also respectfully advise Your Honor of the following:

The appellant is contemplating the filing of a petition for rehearing in this Court, with probably an application for rehearing *en banc*. Mr. Morgenthau's letter of January 4, 1967 presents questions which, it respectfully seems to us, cannot be resolved by any such post-haste exchange of mere letter-correspondence as is here occurring. We must respectfully reserve our right to the formal and duly demon-

strative process of the re-hearing procedure for proper and just disposition of the questions posed by Mr. Morgenthau's letter, along with the other questions which we may wish to present for re-hearing. In particular, may I respectfully call Your Honor's attention to the fact that neither the Court's opinion nor Mr. Morgenthau's letter, as we read the opinion and the letter, touch at all upon what was our essential contention in regard to the testimony of Miss Karsh, namely, that, had the Government made timely disclosure, there would have been an opportunity for the defense to move to prevent or exclude her taking the stand at all; that is to say, the issue is not merely one of the adequacy of our opportunity for cross-examination; the issue is as to the polluting of the trial proofs in the first instance by reason of the Government's having contrived to get Miss Karsh's direct testimony before the jury without giving the defense any chance at all to guard itself against what we can only say was an unjustified probative aggression by the Government.

May I respectfully repeat that we do reserve the right to 'litigate' this entire question further by a petition for re-hearing, which will, of course, be timely filed should we decide to request re-hearing.

Respectfully,

MAURICE EDELBAUM

ME:bcg

cc: Hon. Robert Morgenthau,
United States Attorney,
Southern District of New York."

The reference in our above quoted letter to pp. 24-25 of our brief is to a factual recital in which we described pro-

ceedings as to the prosecutor's having turned over to the Court but not to defense counsel, after Miss Karsh's direct examination, "3500" materials inconspicuously revealing (by way of a small separate document attached to another paper) that Miss Karsh had been in serious psychiatric trouble. We stated in our brief (p. 24), and the record confirms (*infra*), that although the prosecutor had not technically "concealed" this item from the Court (in the "disclosures" which were made for the first time after Miss Karsh's direct examination), the Court had evidently not had its attention drawn by the prosecutor to this inconspicuous but all-important item in a proper and adequate manner, the Court had evidently completely missed the item or at least its significance (in consequence of the prosecutor's method of "disclosure"), the defense had been deliberately deprived of the item by the prosecutor, the prosecutor's evidently altogether deliberate intentions in the matter were further revealed when upon being confronted with what he had done he said "the Government's position was that it was not relevant to her direct testimony", and not content with this astounding oversimplification he went on in his immediate next remarks to place on the record some scandalous and entirely unrelated observations about other "3500" items allegedly referring to the appellant. We are about to quote the pertinent colloquy, in which the circumstances just summarized appear; this portion of the colloquy occurred when the prosecutor was endeavoring to limit the defense use of the belated disclosure; it will be especially noted in the item now to be quoted that, although the Court acknowledged that the prosecutor had not literally "concealed" from the Court the tell-tale little slip of paper, the Court said of "that small exhibit which

was taken off the bottom of the statement", "I haven't seen it"; and that the Court further accused the prosecutor of having "clipped that from the exhibit which you indicated to the Court that you were handling for him [defense counsel] in toto"; we quote from pp. 600-601 of the trial testimony:

> "The Court: I think you are taking the precaution a little late, Mr. Fanning. Any precaution you should have taken with regard to this young lady that you produced as a witness on this stand and examined on direct examination and had difficulty in bringing forth certain matters and had to refresh her recollection several times, don't you think you are bringing this matter to the attention of the Court at a little late date? Don't you think so?
>
> Mr. Fanning: I don't think so, your Honor, but I might say this because Mr. Edelbaum has made the statement on the record that I have attempted to conceal the fact of this woman's treatment—
>
> The Court: Mr. Fanning, what was that small exhibit which was taken off the bottom of the statement? What did it disclose? I haven't seen it.
>
> Mr. Fanning: It disclosed that she had been treated psychiatrically in Mount Sinai Hospital.
>
> The Court: And you clipped that from the exhibit which you indicated to the Court that you were handing to him in toto?
>
> Mr. Fanning: That was handed up to the Court and the Court saw that portion of the statement.
>
> The Court: He didn't see what part you had excised. It was on the part I examined, but it was not on the part that was given to Mr. Edelbaum.
>
> Mr. Edelbaum: Do I understand now, your Honor, that this man had the temerity to conceal from the Court what was contained in the paper?

The Court: No, he did not conceal it from the Court.

Mr. Edelbaum: But concealed it from me.

Mr. Fanning: I asked the Court to excise that portion—

Mr. Edelbaum: So I wouldn't know.

Mr. Fanning: Since the government's position was that it was not relevant to her direct testimony."

It is in the face of the above quoted record facts as to the circumstances of the "disclosure" made for the first time only after Miss Karsh's direct examination—i.e., again, it being undisputed that the whole situation had been kept concealed from both the Trial Judge and the defense until the fat was in the fire thanks to the completion of the direct examination—it is in the face of these facts, we say, that the Government is now asking the Court to absolve it of impropriety. We respectfully think that the Government not only should be absolved but that in having sent its above quoted letter-request it betrays so disturbing a renewed and indeed intensified attitude of insensitivity concerning its responsibilities, that this Court should grant rehearing for the purpose of reevaluating the seriousness of the Government's misconduct and should now re-read the scales, on this issue, for we urge that it is now clearer than before that there should be a reversal of the conviction on this ground alone. True, it is not the business of an individual appellant seeking relief from a judgment of criminal conviction on the ground of prosecutive misconduct, to preach to the Court (or even to the prosecutor) that unless prosecutors are admonished strongly enough for misconduct they will not behave in the future, or that the only effective admonishment that

such prosecutors may take to heart is in the form of that ultimate appellate admonition, reversal of the judgment of conviction. Nevertheless, at the risk of unseemly intrusion into this Court's own policy province, we do ask the Court to consider that where a Governmental prosecutive office is bearing itself in so unregenerate and almost defiant a manner notwithstanding a stern admonitory expression by the Court, and where the record so unequivocally bids the Government to hold its tongue, but where the Government nevertheless clamors back at the admonishing Court, there seems to be no other effective way of finally bringing the Government to account, and to a sense of its past misdeed and future obligation, than by teaching such Government spokesmen the only lesson they can apparently understand, reversal of judgment.

We respectfully consider this matter of the Government's misconduct, and of its apparent unabashedness pointing to incorrigibility in the circumstances here presented, to be of that overriding degree of importance which would justify resort to the extraordinary processes of this Courts *en banc* rehearing procedures, in the event that the Panel should consider the matter unfavorably to our contention or should deem it wise to call upon the voice of the entire Bench to declare the solemn result which we here pray, as being the only result that can do effective justice in this case and can effectively serve the interests of Federal criminal justice generally in the Southern District of New York."

BRIEF IN OPPOSI-
TION TO PETITION
FOR A WRIT OF
CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1200

HENRY B. McFARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1–8) is reported at 371 F. 2d 701.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. A petition for rehearing was denied on January 26, 1967. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to March 27, 1967, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony on which petitioner's prosecution for perjury before a grand jury was

260-905—67

founded was properly held to be material to the grand jury's investigation.

2. Whether, in the circumstances, government counsel's failure to inquire fully into the mental competency of a government witness deprived petitioner of a fair trial.

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the Southern District of New York on two counts of perjury (counts 2 and 3; A. 9a–12a [1]) in violation of 18 U.S.C. 1621. On June 22, 1966, he was sentenced to imprisonment for six months on count 2, and to a suspended sentence of one year and six months on count 3; he was also placed on probation for a commensurate period of time consecutive to the sentence on count 2. The court of appeals affirmed the conviction (Pet. App. A 1–8; 371 F. 2d 701).

The evidence against petitioner (the sufficiency of which petitioner has not challenged, either here or in the court below) may be briefly summarized. In January 1965, a federal grand jury in the Southern District of New York was investigating possible violations of the Mann Act and Federal Communications Act with respect to the transportation of prostitutes from that district to the Hudson County Jail, Jersey City, New Jersey, and the use of the telephone in furtherance of that activity (Tr. 1144–1148). Petitioner, warden of the Hudson County Jail since 1951,

[1] References are to the original transcript of trial ("Tr.") and to the Government's appendix ("G.") and Appellant's appendix ("A.") in the court below, all of which are on file with the Clerk of this Court.

appeared before the grand jury on January 26, 1965, and was placed under oath (Tr. 1146). He was warned of his rights and of his liability for prosecution for perjury should his testimony be wilfully false (Tr. 1154–1156). Among other questions, petitioner was asked (1) if he knew one Marilyn Jean Fraser (Tr. 1172–1173, 1184–1186); (2) if he permitted inmates, in return for money, to make telephone calls other than notification to their families that they were in custody (Tr. 1176–1177); (3) if he permitted inmates, in return for money, to have favors, such as special meals, special quarters, and visits from women (Tr. 1178, 1186); and (4) if he permitted prostitutes to visit one Harold Konigsberg and other inmates (Tr. 1182). Petitioner answered each question in the negative. Subsequently the grand jury returned a four count indictment charging perjury with respect to his answers (Pet. App. A12–A20).

At the perjury trial, Milton Pollack, who was incarcerated in the Hudson County Jail from March to June 1962, testified that he received various favors from petitioner in the nature of comfortable quarters (including television, hospital bed, hot plate and refrigerator) (Tr. 638–639), telephone privileges (approximately twice a day) (Tr. 643–645), business trips outside of the prison (Tr. 683–692), and visits from prostitutes in petitioner's office (Tr. 713–720). In return for these special favors, Pollack paid petitioner with theater tickets (Tr. 681–683), luggage (Tr. 688–689), $300 in travelers' checks (Tr. 691–699),

and more than $2,000 in personal checks (Tr. 648–678, 708).[2]

Jack Fitzpatrick, who was in the jail in late 1962 and early 1963, was allowed private visits with a Mrs. Janet Taccetta after making $10 payments to petitioner (Tr. 110–126, 163–166). Harold Ross, who was in the jail from October 1963 to August 1964, was moved to more commodious quarters in consideration for $50 paid to petitioner (Tr. 227–231). In these quarters, Ross regularly received male and female friends, as well as members of his family. His guests played cards, watched television, and ate with him. Ross and the other inmates in the same quarters also had the privilege of having guards obtain food for them outside of the prison (Tr. 240–244, 372–374). During a five month period, he was allowed to place 174 toll calls from the prison telephone (Tr. 244–245, 247–252). For his special treatment, Ross paid petitioner approximately $25 per week (Tr. 237, 246, 254–255).

Other prisoners testified to similar treatment and privileges in return for payments to petitioner (*e.g.*, Tr. 18–19, 171–180, 205, 213, 401–412, 527–547).[3]

ARGUMENT

Reduced to essentials, the petition presents two issues (compare Pet. 2–6): (1) whether petitioner's wilful false testimony to the grand jury concerned

[2] We note that the trial judge discounted witness Pollack's credibility in commenting briefly to the jury on his testimony (A. 40a).

[3] The facts with respect to the second issue are set forth *infra*, pp. 6–8.

a matter "material" to its investigation, within the meaning of the perjury statute (18 U.S.C. 1631), and (2) whether petitioner was deprived of a fair trial because the government failed, in advance of the testimony of one of its witnesses, to investigate fully into the witness's history of mental problems. Neither issue warrants review in this Court.

1. Before submission of the case to the jury, counts 1 and 4 of the indictment were dismissed (Tr. 1343; 1757–1758) for insufficiency of proof under the "two witness" rule (see, *e.g., Arena* v. *United States,* 226 F. 2d 227 (C.A. 9), certiorari denied, 350 U.S. 954). Also, a portion of count 3 (italicized at Pet. App. A18) was excised, because the form of one of the grand jury's questions on which the count was based assumed facts not proved (Tr. 1761–1763; 1767). Premising his argument on the characterization of the instant case as one concerning "Mann Act perjury" (Pet. 16), petitioner apparently contends that, inasmuch as references to violations of the Mann Act were deleted from the perjury case as submitted to the jury, no federal crime was committed. The contention is wholly without substance. Petitioner was not indicted for "Mann Act perjury"; indeed, as the court below noted "there is no such concept" (371 F. 2d at 704). Petitioner's crime was that of wilfully giving false testimony under oath as to a material matter before a competent tribunal. 18 U.S.C. 1621. There can be no doubt that the federal grand jury was legally competent to investigate into possible Mann Act and Federal Communications Act viola-

tions[4] involving the Southern District of New York. The questions asked of petitioner (incorporated in counts 2 and 3) sought information concerning unusual telephone privileges (A. 9a–10a; 12a) and special favors such as the availability of liquor (A. 11a) and permission to have women visitors (A. 11a), and were material to the grand jury's investigation, whether or not a Mann Act offense was ultimately proved or charged; it is of course clear that the test of materiality is "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation * * *" *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2); *accord, e.g., United States* v. *Marchisio*, 344 F. 2d 653, 665 (C.A. 2). There can be no doubt that the questions and false answers here were material in that the natural effect of petitioner's denials was to impede the grand jury's investigation. And, as the court below pointed out (371 F. 2d at 703), the offense is committed before the grand jury and materiality is determined as of the time when the false answers are given; materiality does not become "washed out" (Pet. 25; see also Pet. 16–24) of the case at some later time.

2. On direct examination, a government witness, Ruth Karsh, testified that on several occasions she

[4] Petitioner contends (Pet. 25–35) that a conviction under 47 U.S.C. 203 and 501, would be unconstitutional. This question, however, is not reached here, since, as we show, the questions petitioner falsely answered were material to the grand jury's investigation into Mann Act violations. Moreover, petitioner's lengthy argument on this point ignores the teachings of the *Dennis* case, see *Dennis* v. *United States*, 384 U.S. 855, 867.

was allowed, after making payments to petitioner, to visit one of the inmates in the Hudson County Jail (Tr. 532–533, 536–538, 545–546). At the conclusion of the direct testimony, government counsel gave the entire F.B.I. report (relating to interviews with Miss Karsh) to the court. The portions of the report which the government believed to be properly producible under 18 U.S.C. 3500 were circled with red crayon. A copy of the report, to the extent government counsel believed to be producible, was turned over to petitioner (G. 2). Uncircled on the report submitted to the court, and therefore absent from the copy furnished to petitioner, was a paragraph relating to Miss Karsh's treatment at Mount Sinai Hospital (G. 6). During the course of cross-examination, petitioner elicited the fact of the prior institutionalization, and then asked for information with respect to the witness's mental history. The court *sua sponte* called for and examined the hospital and medical records, and turned the information over to the defense.

The records showed that, after her mother's death in 1961, the witness sought medical assistance at the psychiatric division of Mount Sinai Hospital, where she was treated for three months in 1961, and two weeks in April-May 1965. She was also treated at the Manhattan State Hospital from May to September 1965 (Tr. 573, 580–583), having been discharged from Manhattan in her own custody on September 17, 1965, nearly eight months before she testified below, after a staff conference found that she had "no abnormal mental trends" (Tr. 593–594).

For three months prior to trial Miss Karsh had held a steady job as a printer, and she was maintaining her own apartment in Brooklyn (Tr. 571–572). Before producing her as a witness, government counsel (who had not examined the medical records beforehand) satisfied himself, through personal interviews, that "she was in all respects competent to testify, intelligent and able to fully recollect, observe and narrate" (G. 3). The trial court found no error in having permitted the witness to testify on direct examination, but allowed great latitude to the defense on cross-examination.

In these circumstances, there is no merit to petitioner's allegations of concealment and non-disclosure as a predicate for error. Although the court below found the prosecutor's calling of the witness, without having made full inquiry into her mental background and disclosure of it to the court, to have been "ill-advised," neither it nor the trial court considered that the government had been deceitful (G. 5; Pet. App. A 9–10). Moreover, the court below properly ruled that petitioner had not been prejudiced by the government's action; it observed (371 F. 2d at 704–705)—

> Defense counsel eventually learned all the facts of the witness's history in time to make full use of it on cross-examination, did get before the jury the essential information affecting her credibility, did not ask for any further adjournment, and did not move to strike the witness's direct testimony on the ground of incompetence.

The witness's testimony was competent and lucid at all times. Her credibility was an issue for the jury.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

APRIL 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967